



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION COMMISSION
SECRETARIAT

2007 SEP 18 A 11:40

SENSITIVE

SEP 18 2007

Ezra Reese, Esq.
Perkins Coie
607 14th Street, N.W.
Washington, DC 20005

RE: MUR 5646
Burton Cohen

Dear Mr. Reese:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, on February 3, 2005, the Federal Election Commission found reason to believe that Burton Cohen knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) and instituted an investigation in this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations of 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission. See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed. Reg. 7551 (Feb. 16, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must

28044210090

be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Dawn Odrowski or Ana Peña-Wallace, the attorneys assigned to this matter, at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
ANT

Thomasenia P. Duncan
General Counsel

Enclosure
Brief

28044210091

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4)
5 Burton Cohen)

MUR 5646

6
7
8 **GENERAL COUNSEL'S BRIEF**
9

10 **I. INTRODUCTION**

11 This matter arose from information ascertained by the Federal Election Commission
12 ("The Commission") in the normal course of carrying out its supervisory responsibilities. See
13 2 U.S.C. § 437g(a)(2). The Commission found reason to believe ("RTB") that Burton Cohen
14 knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) by using
15 funds from his state senate committee, raised outside the prohibitions, limitations and reporting
16 requirements of the Federal Election Campaign Act of 1971, as amended ("the Act"), for start-up
17 expenses for his U.S. Senate campaign. See Factual and Legal Analysis to Burton Cohen dated
18 February 3, 2005.

19 Evidence obtained during the ensuing investigation establishes that Cohen for New
20 Hampshire and John Buchalski, in his official capacity as treasurer, ("the Committee") through
21 Cohen and his campaign manager, Jesse Burchfield, spent between \$23,800 and \$25,360 in state
22 campaign funds to finance the initial expenses for Cohen's federal campaign and that Burchfield
23 knew that using those funds for a federal election was prohibited. Based on the results of the
24 investigation, the General Counsel is prepared to recommend that the Commission find probable
25 cause to believe that Cohen violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).

26 **II. BACKGROUND**

27 Cohen first hired Burchfield in March 2002 to manage his campaign for re-election to the
28 New Hampshire State Senate for a seventh term. After winning that election, Cohen hired him to

28044210092

28044210093

1 manage his U.S. Senate campaign, a prospect they had previously discussed during the state
2 campaign.¹ Cohen and Burchfield began working on the federal campaign in late November
3 2002 and through the first eight months of 2003, the Committee primarily consisted of only three
4 paid staff members working out of a one room office: Campaign Manager Burchfield, whose
5 duties included handling the Committee's finances and preparing and filing the Committee's
6 FEC disclosure reports; David Mowrey, placed on the campaign as a Finance Director by the
7 firm Cunningham Harris & Associates ("CHA"), who handled fundraising; and Assistant
8 Finance Director Sharon Valdez, who assisted Mowrey and Burchfield. Committee treasurer
9 John Buchalski had no role in the operation of the campaign except to sign the first two
10 Committee disclosure reports, which were brought to him by Committee staffers.² A fourth paid
11 staff member was hired in September 2003 as a field director.

12 As the Committee's fundraising lagged, Cohen and Burchfield decided to replace CHA in
13 or about February 2004 and fired the field director. Ellen Stankiewicz, an experienced fundraiser
14 recommended by another consultant, replaced Mowrey as Finance Director on March 1, 2004.
15 Around the same time, the Committee began staffing up, hiring a press secretary, two full-time
16 field organizers, a scheduler/driver, and another finance assistant for Stankiewicz. Just before
17 the campaign folded in June 2004, the Committee had fully staffed its field operation with more
18 than 20 staff members.

¹ Cohen filed a Statement of Candidacy for the 2004 U.S. Senate election on January 16, 2003, naming "Cohen for New Hampshire" as his principal campaign committee, and the Committee filed a Statement of Organization on January 27, 2003.

² It appears that John Buchalski, the Committee's named treasurer, sent Cohen a letter resigning as treasurer on June 14, 2004, shortly after Cohen withdrew from the U.S. Senate race. Neither Cohen nor the Committee has filed the letter or an amended Statement of Organization with the Commission replacing Buchalski with a new committee treasurer. Consequently, absent the required filings, Buchalski still appears in the Commission's records as the Committee treasurer, although Cohen has been signing the Committee's disclosure reports since June 2004.

28044210094

1 By June 2004, Cohen had decided to replace Burchfield as campaign manager after
2 repeated complaints from staff about Burchfield's management of the campaign and lack of
3 interpersonal skills. In an interview, Cohen explained that he did not inform Burchfield of his
4 plan, intending to present the new hire as someone to "assist" Burchfield so that Burchfield
5 would not "quit in a huff and stir up the press." Nevertheless, rumors of Burchfield's
6 replacement reached lower level staff, and on June 7, 2004, Burchfield sent an e-mail entitled
7 "Goodbye" to Cohen and other campaign staff. He informed them that "expenses for the past
8 year and half have outpaced our income consistently," that "currently the campaign is broke,"
9 offered to "provide any help needed to the FEC" and urged them to meet with the campaign's
10 consultants to "move past this."³

11 After they received Burchfield's e-mail, Committee staff and some of its consultants
12 quickly confirmed the Committee's dire financial condition. Cohen withdrew from the race on
13 June 10, 2004 and hired counsel and an accounting firm to conduct a forensic audit, initially to
14 determine if Burchfield had embezzled funds. The Committee first notified the Commission of a
15 problem in letters responding to a Reports Analysis Division Request for Additional Information
16 ("RFAI") about the 2004 April Quarterly Report and accompanying the Committee's next
17 regularly scheduled report, the 2004 July Quarterly Report.⁴ The Committee's letters, dated
18 June 23, 2004 and July 15, 2004, provided little detail, stating only that the Committee was
19 undergoing a "thorough review of campaign finances and reporting" and that a discovery of a

³ The next day, Burchfield sent a second e-mail to Cohen in which he admitted that he had kept the campaign's financial situation from Cohen, denied accusations that he had stolen money, and offered to cooperate in any investigation. Burchfield also left a voice-mail message for Cohen in which he apologized to Cohen, expressed his hope that Cohen would continue with the campaign, advised that he was drafting a letter to the FEC for Cohen's approval taking "the blame for all this," and stated "it was all my fault."

⁴ The RFAI inquired about incorrect receipt and disbursement figures on the report's summary pages, an incorrect cash balance, and the omission of loans that were disclosed in previous reports.

1 "significant discrepancy" in its cash on hand necessitated a "reconstruction of certain
2 transactions." The Committee filed incomplete amendments to its 2004 disclosure reports in
3 December 2004, then filed comprehensive amendments to all of its disclosure reports on July 1,
4 2005, four months after it had been notified of the Commission's reason to believe findings and
5 more than a year after the campaign ended.

6 **III. COHEN VIOLATED THE PROHIBITION AGAINST THE USE OF NON-**
7 **FEDERAL FUNDS TO PAY FOR FEDERAL CAMPAIGN ACTIVITY**
8

9 Burton Cohen has admitted that he and Burchfield spent state campaign funds from
10 Cohen's state campaign account, Friends of Burt Cohen, for Cohen's U.S. Senate campaign and
11 that those disbursements were not disclosed in the Committee's first FEC disclosure report. *See*
12 Cohen Deposition Transcript ("BC Tr.") at 41, 186-88; Cohen RTB Response at 2-3; Committee
13 RTB Response at 4. All told, Cohen and Burchfield spent between \$23,800-\$25,360 in state
14 campaign funds for the federal campaign. *See* Affidavit of Jesse Burchfield (hereinafter "JB
15 Aff.") at ¶ 13.⁵

16 The Act, as amended by the Bipartisan Campaign Reform Act of 2002, prohibits a federal
17 candidate, a candidate's agent, and entities established, financed, maintained or controlled by, or
18 acting on behalf of, a candidate from soliciting, receiving, directing, transferring or spending
19 funds in connection with a Federal election unless the funds are subject to the limitations,
20 prohibitions and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A). Moreover,
21 Commission regulations specifically prohibit transfers of funds or assets from a candidate's
22 campaign for a non-federal election to his or her federal campaign. 11 C.F.R. § 110.3(d). This

⁵ In his affidavit, Burchfield described the use of state funds as ranging between \$25,358 and \$29,358 because he was unsure which of the salary checks issued to him in November and December 2002 were for his work on the federal rather than the state campaign. JB Aff. ¶ 13. The more accurate figure is likely between \$23,800 and \$25,358 based on Cohen's testimony regarding the 2002 salary checks. *See infra* n 7.

1 prohibition applies to payments made by a state campaign committee on behalf of a federal
2 campaign as well as to the direct transfer of funds to a federal committee. *See, e.g.*, MURs 4974
3 (Tiberi for Congress), 5480 (Levetan for Congress), and 5426 (Schultz for Congress).

4 During Cohen's 2002 state senate re-election campaign, Cohen and Burchfield decided to
5 raise more money than Cohen likely needed to win re-election so that they could use the excess
6 funds in a bid for higher office after the election, either Governor of New Hampshire, or most
7 likely U.S. Senate. *See* Burchfield Affidavit ("JB Aff.") ¶¶ 3-4, 7; BC Tr. at 38-42. Within a
8 month of his re-election to state senate on November 5, 2002, Cohen and Burchfield began
9 working on his U.S. Senate campaign, advertising for a fundraiser and interviewing consultants.
10 They also began spending the excess state funds they had raised to pay the initial expenses for
11 the federal campaign.⁶ These disbursements, made between November 2002 and February 2003,
12 included the first consulting fee for the Committee's fundraising consultant, CHA, housing costs
13 for Burchfield and the CHA finance director pursuant to their respective contracts, the salaries of
14 Burchfield and Valdez, speechwriting assistance, phone line deposits, the purchase of office
15 supplies and postage and printing costs. *See* JB Aff. ¶ 13; *see also* BC Tr. at 77-78, 82;
16 Committee RTB Response at 4. Cohen and Burchfield together spent the state funds. They
17 specifically discussed paying CHA's initial fee, and Burchfield, in his role as campaign manager
18 took care of routine expenses such as office supplies, printing and postage. *Id.* at ¶ 11; *see also*

⁶ Cohen testified that he left it up to Burchfield to set up the procedures for handling the Committee's funds, gave him significant control over handling and tracking the Committee's finances, and delegated to Burchfield the responsibility for learning and complying with FEC law, including preparing and filing disclosure reports. *See* BC Tr. at 110-11 (financial procedures); BC Tr. at 58-59 and 113-115, and JB Aff. ¶ 15 (handling finances); and BC Tr. at 41 and 97, and JB Aff. ¶ 16 (compliance and reporting). Cohen testified that at the time Burchfield and Cohen began spending Cohen's state campaign funds for the federal election, Cohen did so relying on Burchfield's assurances that doing so was "okay" and did not question the basis for Burchfield's counsel or seek the guidance of anyone else. BC Tr. at 41-44. Burchfield, however, has claimed that he advised Cohen at the time that state campaign spending on behalf of a federal campaign was prohibited by law. JB Aff. ¶ 6.

1 *id.* ¶¶ 12-13. Because Cohen had sole signatory authority on the state campaign account,

2 Burchfield prepared checks from the state account for Cohen's signature. *Id.* at ¶ 9.

3 Cohen has specifically acknowledged the use of state funds in 2003 by reporting most,
4 but not all, of the \$19,400 in disbursements as in-kind contributions from the state committee in
5 the Committee's amended 2003 April Quarterly Report, which was filed after Respondent's RTB
6 response in this matter. In addition to the 2003 disbursements, between \$4,500-\$6,000 in state
7 campaign disbursements made in November and December 2002 for Burchfield's salary and
8 housing allowance were apparently made in connection with the federal campaign since they
9 were made over and above Burchfield's state campaign salary and housing allowance at a time
10 when Burchfield and Cohen were already working on the federal campaign.⁷

11 During the relevant period, New Hampshire state law permitted individuals, political
12 committees, and corporations to make contributions of up to \$1,000 to a candidate who had not
13 agreed to voluntarily limit campaign expenditures, as was the case with Cohen.⁸ A limited
14 review of Cohen's state campaign account indicated that it contained prohibited funds from
15 corporations and the non-federal accounts of political committees, donations from individuals
16 who also contributed to the federal committee and whose combined contributions to both

⁷ The 2002 disbursements are comprised of \$4,500 in salary payment to Burchfield in December and a \$1,500 payment in November to Burchfield's landlord for the apartment he occupied during the federal campaign. Like Burchfield, Cohen was uncertain how much he had agreed to pay Burchfield during this period, but he testified that he agreed to pay Burchfield's \$2000 monthly state salary through December 2002, may also have paid him a state campaign bonus, and initially agreed to pay him between \$3,000-\$3,500 in salary plus housing costs for the federal campaign. See BC Tr. at 15-18; 51-52; 177. When reviewing copies of these checks during his deposition, however, Cohen questioned whether some of the signatures were his, although he testified that at least one of checks bearing a questionable signature was authorized. See BC Tr. at 172-177. Based on Cohen's testimony and the fact the he and Burchfield were already working on the federal campaign during this period, it appears likely that at least \$3,000 of the salary payments and the \$1,500 housing payment are attributable to the federal campaign.

⁸ See N.H. Rev. Stat. Ann. § 664:4, V. Corporations are permitted to contribute within the same limit as individuals based on a 1999 U.S. District Court decision ruling that New Hampshire's prohibition on corporate contributions was unconstitutional. See *Kennedy v. Gardner*, 1999 WL 814273 (D.N.H. Sep 30, 1999) (No. CV 98-608-M) and Opinion Letter dated June 6, 2000 from Deputy Attorney General to William M. Gardner, Secretary of State.

1 campaigns exceeded the federal contribution limit, and donations from limited liability
2 companies and non-registered political committees that may have been impermissible under
3 federal law. Consequently, by spending state campaign funds for his federal election, which the
4 Committee failed to disclose, Cohen spent, and the Committee effectively received, funds for a
5 federal election that were not subject to the Act's limits, prohibitions, and reporting requirements
6 in violation of 2 U.S.C. § 441i(e)(1)(A). In addition, these payments made by Cohen violated
7 the prohibition against transfers from non-federal to federal campaigns set forth in 11 C.F.R.
8 § 110.3(d).

9 Therefore, the General Counsel is prepared to recommend that the Commission find
10 probable cause to believe that Burton Cohen violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R.
11 § 110.3(d).

12

28044210098

IV. GENERAL COUNSEL'S RECOMMENDATIONS


Find probable cause to believe that Burton Cohen violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).

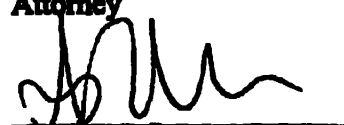
9/12/07
Date


Thomasenia P. Duncan
General Counsel


Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement


Sidney Rocks
Assistant General Counsel


Dawn M. Odrowski
Attorney


Ana J. Peña-Wallace
Attorney

28044210099